

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
AT&T MOBILITY, LLC)	WT Docket No. 13-10
)	
Petition for Waiver of Cellular License)	
Application Rules Concerning Service Area)	
Boundary Extensions)	
)	
NEW CINGULAR WIRELESS PCS, LLC)	
)	
Application for Major Modification of License)	File No. 0004360447
For Cellular Service in the Denver-Boulder, CO)	
Cellular Market Area (Market 019A),)	
Call Sign KNKA348)	
)	
Application for Major Modification of License)	File No. 0004352640
For Cellular Service in the Greeley, CO)	
Cellular Market Area (Market 243A),)	
Call Sign KNKA649)	
)	
Application for Major Modification of License)	File No. 0004952609
For Cellular Service in the Colorado 5 - Elbert)	
Cellular Market Area (Market 352A),)	
Call Sign KNKN448)	

To: Wireless Telecommunications Bureau

**COMMENTS OPPOSING PETITION FOR WAIVER;
REQUEST FOR DISMISSAL OF APPLICATION**

NE Colorado Cellular, Inc. d/b/a Viaero Wireless ("NECC"), a provider of wireless service in rural areas within Nebraska, Colorado, Kansas and Wyoming, hereby responds to a Public Notice of the Wireless Telecommunications Bureau ("Bureau") inviting comments on a petition filed on behalf of New Cingular Wireless PCS, LLC ("New Cingular") by AT&T

Mobility, LLC (“AT&T”) for waiver of Sections 1.923(a)¹ and 22.911(d)² of the Rules (“Petition”).³ NECC requests that the Bureau deny the Petition and waiver request. Upon denial of rule waivers, the Bureau should deem the above-captioned application incomplete and defective, and dismiss the application in accordance with Section 1.925(c)(ii) of the Commission’s rules. In support of these requests the following is respectfully shown:

I. Background

NECC is a small or regional wireless competitor of AT&T whose affiliate, New Cingular, filed applications for a major modification of the licenses referenced above. These applications, as New Cingular acknowledges, proposes extensions of New Cingular cell contours on into NECC’s co-channel cellular systems in adjacent market areas. Such extensions are prohibited by Section 22.911(d) of the Rules absent an agreement with the cellular licensee into whose CGSA the contours would extend.⁴

Contending that NECC would not agree to the proposed incursion into its CGSA, New Cingular, on October 10, 2012, submitted the Petition as a supplement to its application. AT&T and New Cingular ask the Bureau to override the rights of NECC to CGSA protection that is explicitly afforded by Section 22.911(d) of the Rules. Neither the amendment nor the Petition was

¹ 47 C.F.R. § 1.923(a). Section 1.923(a) of the Commission’s rules (“Rules”) establishes a requirement that wireless radio service applications include “all information requested on the applicable form and any additional information required by . . . any rules pertaining to the specific service for which the application is filed.”

² 47 C.F.R. § 22.911(d). Section 22.911(d) prohibits a cellular licensee from commencing operation of any facility that would cause a service area boundary (“SAB”) “to overlap the existing CGSA [Cellular Geographic Service Area] of another cellular system on the same channel block, without first obtaining the written consent of the licensee of that system.”

³ *Public Notice*, DA 13-44, released February 5, 2013 (“Public Notice”) by the Wireless Telecommunications Bureau. The deadline for submission of these Comments is February 20, 2013.

⁴ *See* Section 22.911(d)(2)(i).

served on NECC or its contact representative who is listed in the Bureau's cellular license data base.

II. The Petition Should be Denied

For any of a variety of reasons, the Bureau should deny the AT&T waiver requests.

A. AT&T Failed to Satisfy the Waiver Standard of Section 1.925(b) of the Rules

An applicant for a rule waiver “faces a high hurdle even at the starting gate” for it ““must plead with particularity the facts and circumstances”” which warrant the waiver. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1968) (quoting *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968)). See *Rules Governing Hearing Aid-Compatible Telephones*, 22 FCC Rcd 7171, 7176 (2007) (“*Section 20.19 Waiver*”). The high hurdle faced by an applicant for a waiver of a wireless rule is the waiver standard set forth in Section 1.925(b) of the Rules. That standard burdens the applicant to plead with particularity the facts and circumstances showing either that: (1) the underlying purpose of the rule would not be served or would be frustrated by its application, and the waiver would serve the public interest; or (2) unique or unusual factual circumstances would make the application of the rule inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. See 47 C.F.R. § 1.903(b)(3); *Section 20.19 Waiver*, 22 FCC Rcd at 7176. AT&T makes no attempt to carry its burden.

AT&T had an especially heavy burden to carry in order to justify a waiver of Section 22.911(d) of the Rules given that the “[p]rotection afforded” NECC by that rule gives rise to rights protected by due process. 47 C.F.R. § 22.911(d). The rule first provides that a CGSA is “the area within which cellular systems are *entitled* to protection and within which adverse

effects for the purpose of determining whether a petitioner has standing.” 47 C.F.R. § 22.911 (emphasis added). The rule also provides:

Within the CGSA determined in accordance with this section, cellular systems are *entitled* to protection from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block.⁵

* * * * *

Cellular licensees are at most *entitled* to have a CGSA free of SABs from other cellular systems on the same channel block.⁶

The word “entitle” means “to give a right or legal title to.”⁷ Thus, Section 22.911 gives a cellular licensee the rights to have a CGSA “free of SABs” and to be protected from interference and the “capture of subscriber traffic” within its CGSA. The “adverse effects” threatened by interference and the capture of subscriber traffic within a CGSA are legally cognizable for the purpose of affording the licensee standing to assert its rights to protection under Section 22.911(d).

“In an effort to protect cellular system operators from losing customers, [Section 22.911(d)] established a bright-line rule that subscriber traffic is considered captured when the SAB of the first system overlaps the CGSA of the second system.” *Bachow/Coastal, L.C.C. v. GTE Wireless of the South, Inc.*, 15 FCC Rcd 4484, 4487 (Enf. Bur. 2000). See 47 C.F.R. § 22.911(d)(2)(i) (“Subscriber traffic is captured if an SAB of one cellular system overlaps the CGSA of another operating cellular system”). Thus, Section 22.911(d) protects cellular licensees from economic injury (losing customers), as well as interference. To protect cellular licensees from interference and the capture of subscriber traffic, the rule provides:

[C]ellular licensees must not begin to operate any facility that would cause an

⁵ 47 C.F.R. § 22.911(d) (emphasis added).

⁶ *Id.* § 22.911(d)(2)(ii) (emphasis added).

⁷ Black’s Law Dictionary 532 (6th ed. 1990).

SAB to overlap the existing CGSA of another cellular system on the same channel block, without first obtaining the written consent of the licensee of that system....Cellular licensees *may* enter into contracts with the licensees of other cellular systems on the same channel block to allow SABs to overlap CGSAs.⁸

Insofar as electrical interference and economic injury are the two established grounds for standing before the Commission and the courts, *see, e.g., MCI Telecommunications Corp., Assignor, and Echostar Corp., Assignee*, 16 FCC Rcd 21608, 21623 n.81 (1999), the rights afforded NECC by Section 22.911(d) to be protected from interference and the capture of subscriber traffic are safeguarded by due process. NECC may agree to surrender its rights, but they cannot be “waived” at the request of AT&T and without due process. And, under the circumstances, due process requires that the Commission take a “hard look” at the Petition⁹ and strictly enforce the Section 1.925(b) waiver standard. Even a cursory look at the Petition reveals that AT&T did not even come close to passing the “threshold acceptability test” for waiver requests. *Section 20.19 Waiver*, 22 FCC Rcd at 7176.

At the threshold, AT&T was required to plead with particularity the facts and circumstances which would warrant a waiver of NECC’s right to have its CGSAs free of SABs from New Cingular’s operations. *See id.* The only facts that AT&T alleged with particularity are that it (not New Cingular):

- (1) holds the cellular licenses for the referenced applications;
 - (2) filed modification applications that “reflects” SAB extensions into the NECC CGSAs;
 - (3) made efforts to secure SAB extension agreements with NECC;
 - (4) claims was advised by NECC that it does not enter into such extension agreements;
- and,

⁸ 47 C.F.R. § 911(d)(2)(i) (emphasis added).

⁹ *Rule 20.19 Waiver*, 22 FCC Rcd at 7176 (quoting *WAIT Radio*, 418 F.2d at 1158).

(5) was given no indications by NECC that New Cingular's SAB extensions were causing any interference or otherwise adversely impacting its network.¹⁰

None of the facts that AT&T alleged with particularity are relevant under the Section 1.925(b) standard. The underlying purpose of Section 22.911(d) is not to foster SAB extension agreements, but to afford cellular licensees the right to have their cellular systems protected from interference from, and the capture of subscriber traffic by, adjacent systems on the same channel block. *See supra* pp. 4-5. Specific facts showing that AT&T's attempts to get NECC to enter into an SAB extension agreement were unsuccessful obviously do not establish that enforcement of the requirement that AT&T obtain NECC's written consent for the SAB extensions into the CGSAs would frustrate the underlying purpose of Section 22.911(d). That being the case, AT&T's general and conclusory claims that a waiver of the prior consent requirement would serve the public interest are unavailing.

Section 22.911(d) provides that cellular licensees "may" enter into contracts that allow SABs to overlap their CGSAs. 47 C.F.R. § 22.911(d)(2)(I). *See also id.* 22.912(b) ("cellular system licensees may enter into contracts to allow SAB extensions"). The rule's use of the word "may" means the licensee's decision to enter into an SAB extension contract is discretionary. *See, e.g., Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 34 (1st Cir. 2011). Inasmuch as Section 22.911(d) leaves the decision to enter into an SAB extension agreement a matter of the licensee's discretion, the rule imposes no obligation on NECC to negotiate such an agreement with AT&T.¹¹

¹⁰ *See* Petition at 6-7, Ex. A, Ex. D.

¹¹ A licensee's unwillingness to negotiate, as alleged by AT&T, may simply reflect a licensee's preoccupation with other business issues and regulatory obligations. It may also indicate that a licensee is not ready to make counterbalancing changes to its own cellular facilities to mitigate the effects of the proposed contour extension. Whatever the reason, a cellular licensee may properly decline to negotiate SAB extensions, and it should not be compelled to accept SAB extensions through a rule waiver process.

Consequently, the particular facts alleged by AT&T to show that NECC did not exercise its discretion to negotiate an SAB extension agreement do not establish the presence of “unique or unusual factual circumstances” that would make the enforcement of the requirement that NECC give prior written consent to an SAB extension “inequitable, unduly burdensome or contrary to the public interest.”

Finally, AT&T did not allege specific facts to show that it had “no reasonable alternative” to seeking a waiver of the prior consent requirement. Indeed, AT&T could make no such showing considering that it is seeking a waiver to allow New Cingular to continue to operate facilities with SAB extensions into the CGSAs that it began operating without NECC’s written consent and in violation of Section 1.911(d)(2)(i). *See* Petition at 6-7. The rule that AT&T wants waived contemplates the reasonable alternative that is available to New Cingular. It can reduce the transmitting power or antenna height (or both) at the pertinent cell sites or continue its existing operations until NECC requests that the SAB be removed from its CGSAs. *See* 47 C.F.R. § 22.911(d)(2)(i). If such a request is made, New Cingular must eliminate the SAB extensions. *See Bachow/Coastel*, 15 FCC Rcd at 4489. As the Bureau explained when it enforced Section 22.911(d)(2)(i) in a formal complaint proceeding:

[T]he Rule is clear that the licensee upon being requested to remove its SAB from an adjacent licensee’s CGSA, must proceed to do it, “unless a written consent from the licensee of the other system allowing the SAB to remain is obtained.” Also, no discretion is accorded under the Rule to the licensee of the overlapping system to refuse to remove the SAB when this, in its opinion, would be unreasonable or not in the public interest.¹²

Section 22.911(d) clearly favors a cellular licensee’s right to a CGSA free of SAB extensions over an adjacent licensee’s interest in continuing to operate facilities in violation of the Rule purportedly for the purposes of “ensuring wireless coverage, facilitating broadband build-out,

¹² *Sagir, Inc. v. N.E. Colorado Cellular, Inc.*, 12 FCC Rcd 1185, 1192 (WTB Enf. Div. 1997).

and promoting the efficient use of spectrum.” Petition at 10. The Bureau should deny AT&T’s request for a waiver of Section 22.911(d) because it failed to meet the Section 1.925(b) waiver standard. It cannot do otherwise consistent with due process.

B. AT&T Should Not Be Permitted to Dictate Terms for SAB Extension Agreements by Waiver of Rules

Given that cellular licensees are entitled to protection within their CGSAs from SAB extensions,¹³ AT&T should not be permitted by means of the rule waiver process to compel its small and regional competitors such as NECC to accept signal incursions, let alone to accept them without any conditions or limitations. There is no FCC prescribed form for SAB extension agreements. If a waiver is granted, would small carriers such as NECC have the right to terminate the agreements as is common in many wireless carrier agreements? Or would AT&T obtain by waiver a unilateral and unconditional right to encroach upon the CGSAs of NECC and other carriers?

While the Commission considers major changes to its cellular licensing rules¹⁴ the Bureau should avoid ad hoc rulemaking by waiver. If the Commission determines that the rules should be amended to permit and limit (except by carrier agreement) median field strength to 40 dBuV/m or some other level at the license boundary, all cellular licensees will have the right to modify their systems accordingly. Otherwise the Bureau should respect the right of cellular licensees to negotiate, or not negotiate, for SAB extensions in their CGSAs.

¹³ See 47 C.F.R. §22.911(d).

¹⁴ *Notice of Proposed Rulemaking*, WT Docket No. 12-40, RM No. 11510 at 23 (rel. February 15, 2012).

III. The New Cingular Application Should be Dismissed

Denial of the request for waiver of Section 22.911(d) for any reason will render the captioned application of New Cingular incomplete for lack of an agreement with NECC for extension of cell contours into NECC's CGSA. As an incomplete application without an alternative proposal that complies with the rules, the application is defective and should be dismissed, in accordance with Section 1.925(c)(ii) of the rules.¹⁵

Respectfully submitted,

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¹⁵ 47 C.F.R §1.925(c)(ii).

CERTIFICATE OF SERVICE

I, Kathleen Mathiasen, hereby certify that on this 20th day of February, 2013, copies of the foregoing COMMENTS OPPOSING PETITION FOR WAIVER; REQUEST FOR DISMISSAL OF APPLICATION were sent by e-mail, in pdf format, to the following:

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